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No. 201

Supreme Court U.S.

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OCT 11 1989

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1989

MELVIN DEAS,

Petitioner,

vs.

JUDITH LEVITT, In Her Official Capacity As
City Personnel Director, and NEW YORK
CITY DEPARTMENT OF PERSONNEL,

Respondents.

BRIEF IN OPPOSITION TO A PETITION FOR
A WRIT OF CERTIORARI TO THE NEW YORK
COURT OF APPEALS

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October 6, 1989

28 pp

**COUNTER-STATEMENT OF
QUESTION PRESENTED**

Whether the New York Court of Appeals ruling that an applicants right to be considered for a civil service appointment is limited to the duration of the eligible list upon which his name appears - despite the applicants inability to obtain timely administrative relief to establish his qualifications for consideration - is in conflict with Logan v. Zimmerman Brush Co.?

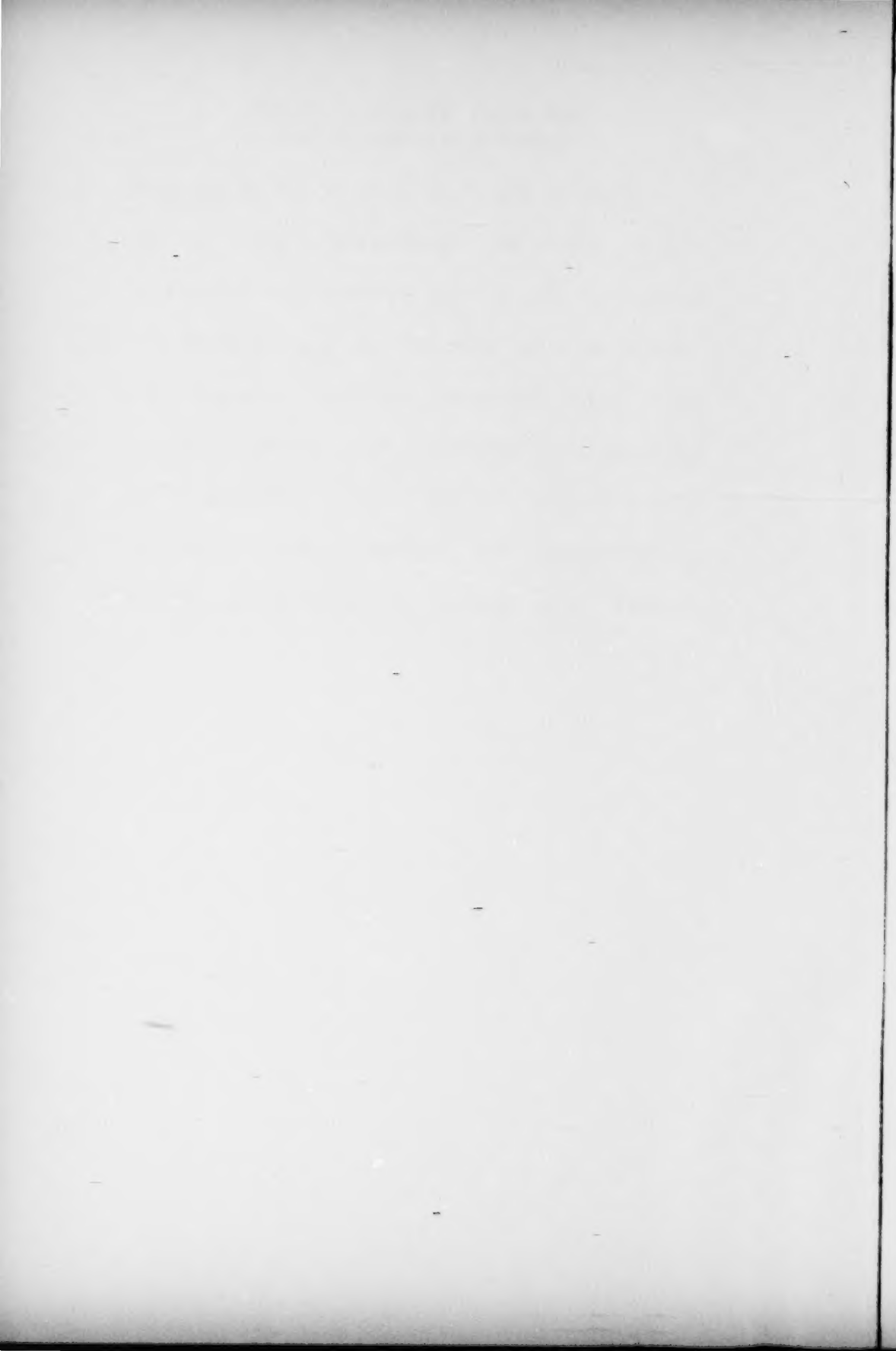


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COURT OF APPEALS

COUNTER STATEMENT OF THE CASE

Petitioner-appellant, Melvin Deas,
employed by the New York City Transit
Authority ("Transit Authority") as a
Maintainer Helper B, applied for a promotion
to the position of Bus Maintainer A in

October, 1983 (A5).¹ He passed the examination for the position and obtained a ranking of V3 on the eligible list established March 21, 1984 (A5). In August 1984, as part of the medical examination required for the position sought, petitioner was examined by a Transit Authority psychiatric consultant (A5). Based on that examination, the Transit Authority found petitioner, who had a history of schizophrenia and drug abuse, medically disqualified (A5-6).

In September, 1984, petitioner appealed the Transit Authority's decision to disqualify him to the New York City Department of Personnel ("Personnel") which conducted a second psychiatric examination in March, 1985 (A6). The Department of Personnel's psychiatric consultant also concluded that

¹References are to the Appellant's Appendix submitted to the New York Court of Appeals.



petitioner should be disqualified for the position due to the risk of recurrence of his psychopathology (A6). Accordingly, Personnel disqualified petitioner for promotion in April, 1985 (A7).

Thereafter, petitioner appealed Personnel's decision to the New York City Civil Service Commission ("Civil Service Commission") (A45). Petitioner requested a hearing in order to refute certain factual assertions in the Department of Personnel Medical Examining Division's memorandum (A18). A hearing was conducted on July 9, 1986 (A8).²

By decision dated August 14, 1986, the Civil Service Commission overturned the

²At the request of counsel for Personnel who was unable to meet with that agency's psychiatric consultant, petitioner agreed to adjourn the hearing from June 18, 1986 to July 9, 1986 (A8).

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persons who have been appointed to the
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medical disqualification of petitioner, stating

(A26):

We have carefully reviewed the documentary and testimonial evidence presented to us. Appellant has demonstrated no psychological nor drug-related difficulties since 1971. No medical disability has been diagnosed since that time. The Department relies primarily on Dr. Petrone's assertion of a 50 percent possibility of recurrence of appellant's disorder and on his concern that appellant's awareness and insight into his illness is low due to his lack of follow-up treatment. This concern, we believe, has been rebutted by appellant's record over the past fifteen years. He has had an exemplary record with the Transit Authority. During that time he has been responsible for driving buses throughout the depot. His duties as a Bus Maintainer "A" would involve few changes from his present position. Only rarely would he be responsible for driving on City streets; these occasions would not involve transporting passengers. His primary driving responsibilities would be within the depot; therefore, the public will not be exposed to risk.

We therefore, conclude that appellant is capable of performing the duties of a Bus Maintainer "A"

at the present time. We also believe that appellant possesses no mental disability that can reasonably be expected to prevent him from carrying out the responsibilities in the future.

Pursuant to Article 78 of the CPLR, the Department of Personnel had four months to consider whether to appeal the Civil Service Commission decision. On September 4, 1986, Personnel advised petitioner that it had decided not to appeal the Civil Service Commission decision and would have petitioner certified for the position of Bus Maintainer A (A9). Thereafter, the Department of Personnel learned that it was unable to certify petitioner. In July 1986, a new examination had been administered for the Bus Maintainer A position (A9).³ Thus, the list on which petitioner's name appeared

³ Nowhere in the petition was it alleged that petitioner took this examination.

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TO THE HONORABLE CHIEF OF BUREAU OF RESEARCH

U. S. DEPARTMENT OF COMMERCE, BUREAU OF RESEARCH

WASHINGTON, D. C. 20540

RE: [Illegible]

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had expired on August 26, 1986, and a new list was established (A10, 45).

Accordingly, on September 5, 1986, the Department of Personnel informed petitioner that he was no longer eligible for the position he sought, and would not be certified (A9). By letter dated September 16, 1986, counsel for petitioner requested that the Department of Personnel place petitioner on a "special eligible list" (A10, 32). By letter dated September 26, 1986, Personnel informed petitioner that it had no authority to establish a "special eligibility list" and that "with the termination of the eligibility list, Mr. Deas' eligibility came to an end" (A39).

On January 9, 1987, petitioner instituted this Article 78 proceeding (A1), alleging that the respondents' failure to certify him based on the expiration of the eligible list was arbitrary and capricious

(A12) and violated petitioner's rights under the due process clauses of the New York State and United States Constitutions (A13). Respondents on March 9, 1987, cross-moved to dismiss the petition for failure to state a cause of action (A41).

OPINIONS BELOW

Special Term

In a decision dated May 6, 1987, Special Term granted the motion to dismiss the petition (A49). The Court reviewed the facts as follows (A50):

In early 1984 Petitioner was a candidate for the Civil Service position of Bus Maintainer A within the New York City Transit Authority. Petitioner was found disqualified medically in September 1984. After an appropriate appeal to the Department of Personnel in March, 1985, he was found medically acceptable on August 14, 1986. Twelve days later a new list for the same position was promulgated inasmuch as the list

for which Petitioner competed
expired on August 6, 1986.⁴

The Court found that petitioner's due process claims were "without merit" (A50). Special Term rejected petitioner's allegation that the Department of Personnel action was arbitrary and capricious, stating that "[t]he function of judicial review in an Article 78 proceeding is not to weigh the facts and merits de novo and substitute the Court's judgment for that of the agency's determination, but rather to decide whether such can be supported on any reasonable basis" (A50).

⁴The date of August 6, 1986, recited by the Court above, is apparently a typographical error as the list, in fact, expired on August 26, 1987 (A9). As the Court noted that the list expired twelve days after the Civil Service Commission decision, it was clearly aware of the timing of the expiration.

Appellate Division

The Appellate Division, First Department, reversed, in a two justice plurality opinion, ruling that the petitioner had been deprived of due process of law by respondents' inability to give effect to his successful administrative appeal because of the expiration of the eligible list on which his name appeared. Although the Court recognized that the petitioner did not possess a property right to appointment, it stated that "he does possess a property right to be considered for the appointment in question" (A86). The Court further found that, pursuant to Logan v. Zimmerman Brush Company, 455 U.S. 422 (1982), "the right to utilize adjudicatory procedures established by state law also constitutes a property interest" (A86).

The Court further found that respondents' procedure was invalid because

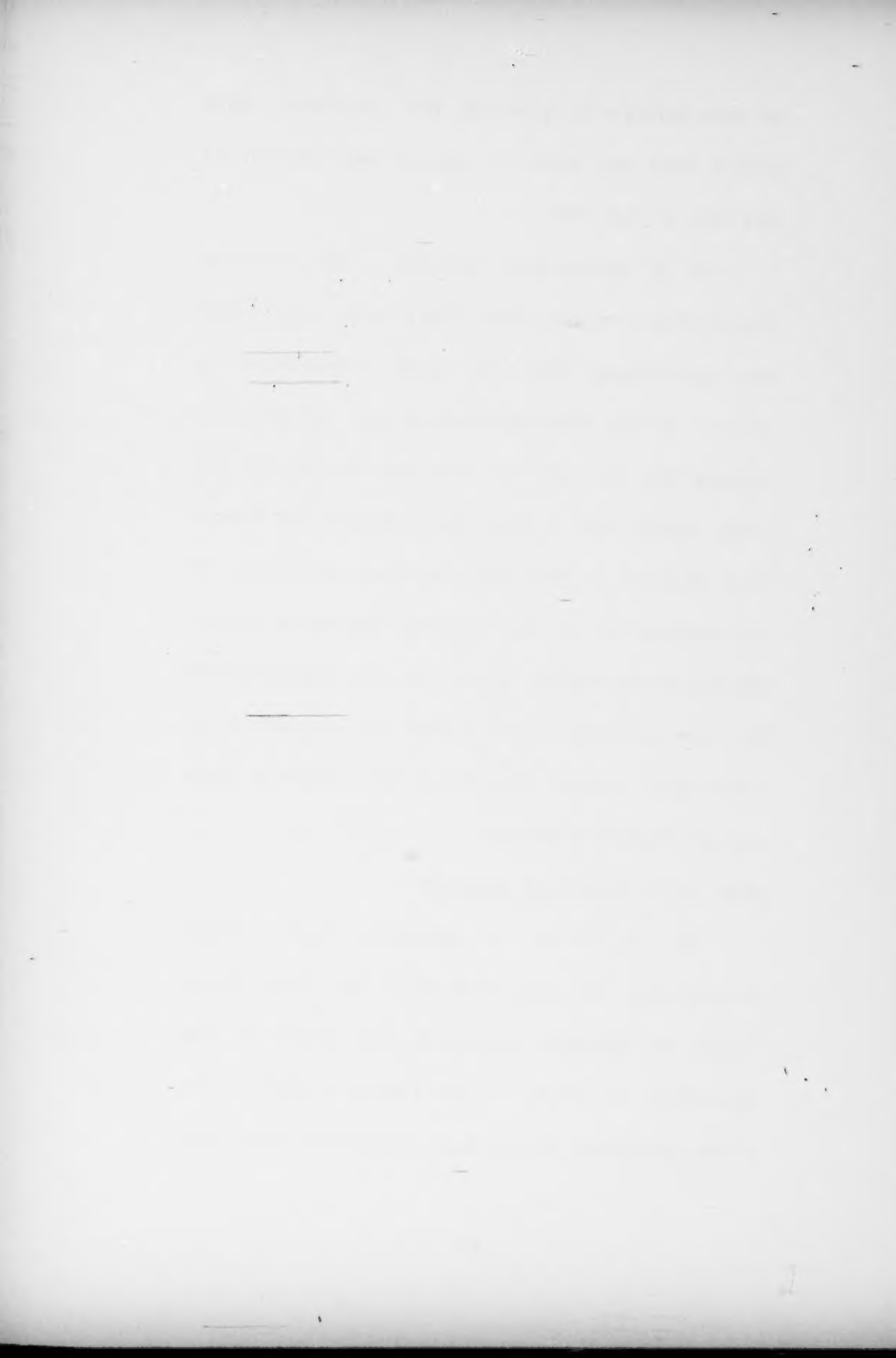


of the failure to provide the petitioner with notice that his right to appeal was limited by the life of the list.

In a dissenting opinion, two justices found that, under New York law, any right the petitioner had to seek administrative review of his disqualification was necessarily limited by the life of the list on which his name appeared. The dissenters also found that petitioner was not entitled to notice of the expiration of the eligible list upon which his name appeared, since he was represented by an attorney and could be expected to know that under New York law, eligible lists are of limited duration.

New York Court of Appeals

In a 4 to 2 decision (one judge concurring in the result), the New York Court of Appeals reversed the order of the Appellate Division. The Court reviewed its prior decisions which had uniformly held that



appointment from an expired civil service list was "a legal impossibility". The reason for that rule, the Court noted, was that the value of a competitive examination demonstrating merit and fitness for a position diminishes over time. At a later time, other candidates who have taken a more recent examination may be better prepared or more fit to fill a position.

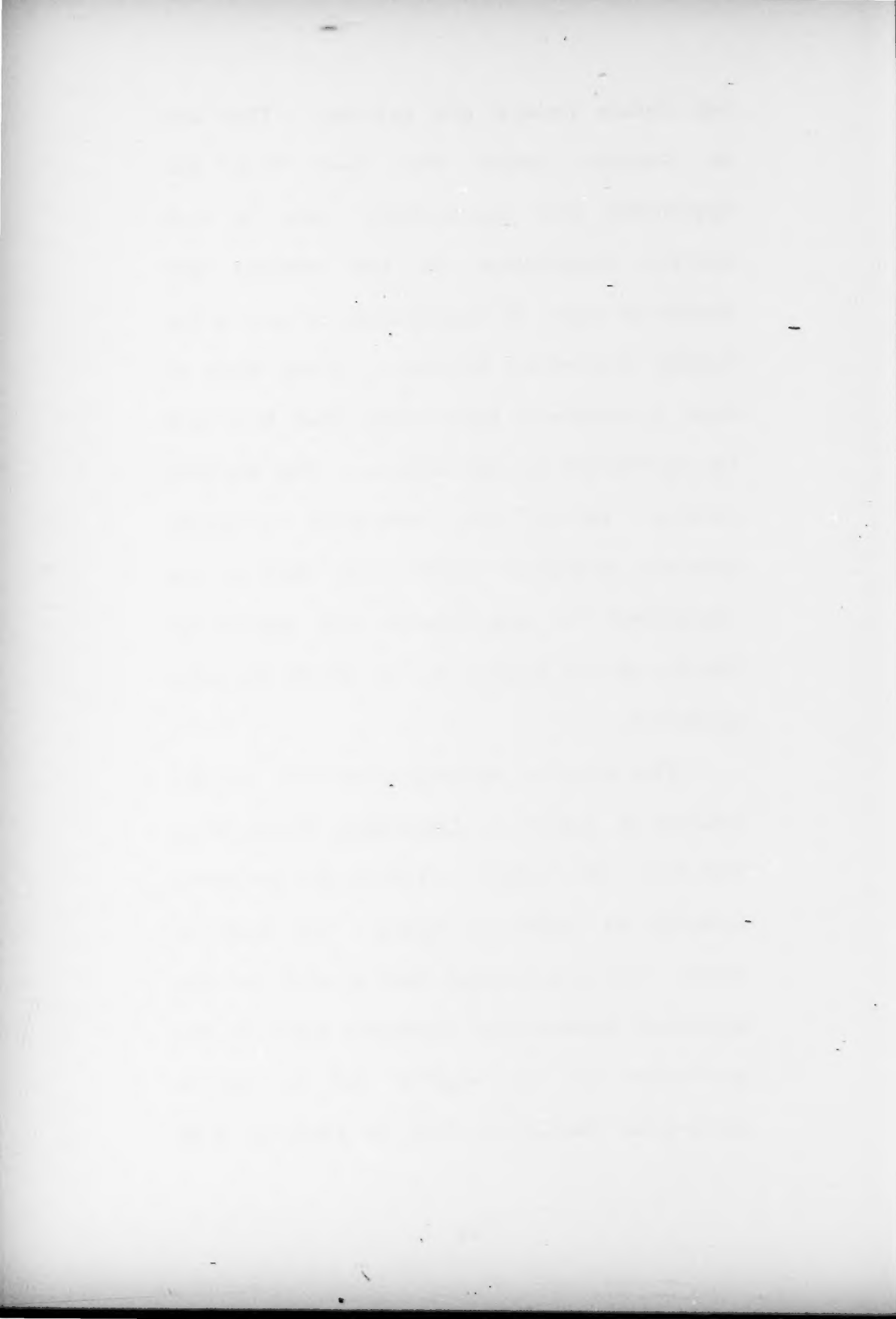
The majority next discussed the narrow exception to this rule which it would continue to allow. Appointment to a special eligible list would be made in the case of an applicant who, prior to the expiration of the list, challenges the validity of the list itself, asserting that the state constitutional merit and fitness requirements have been violated and unqualified individuals are thus obtaining civil service employment.

The Court then determined that the above-noted rule and limited exception did



not violate Federal due process. That was so because under the New York law applicants who successfully pass a civil service examination do not possess any mandated right to employment or any other legally protectible interest. They have at most a unilateral expectation that they will be considered for appointment. The majority further stated that whatever property interest petitioner might have had to be considered for appointment was limited by the life of the eligible list on which his name appeared.

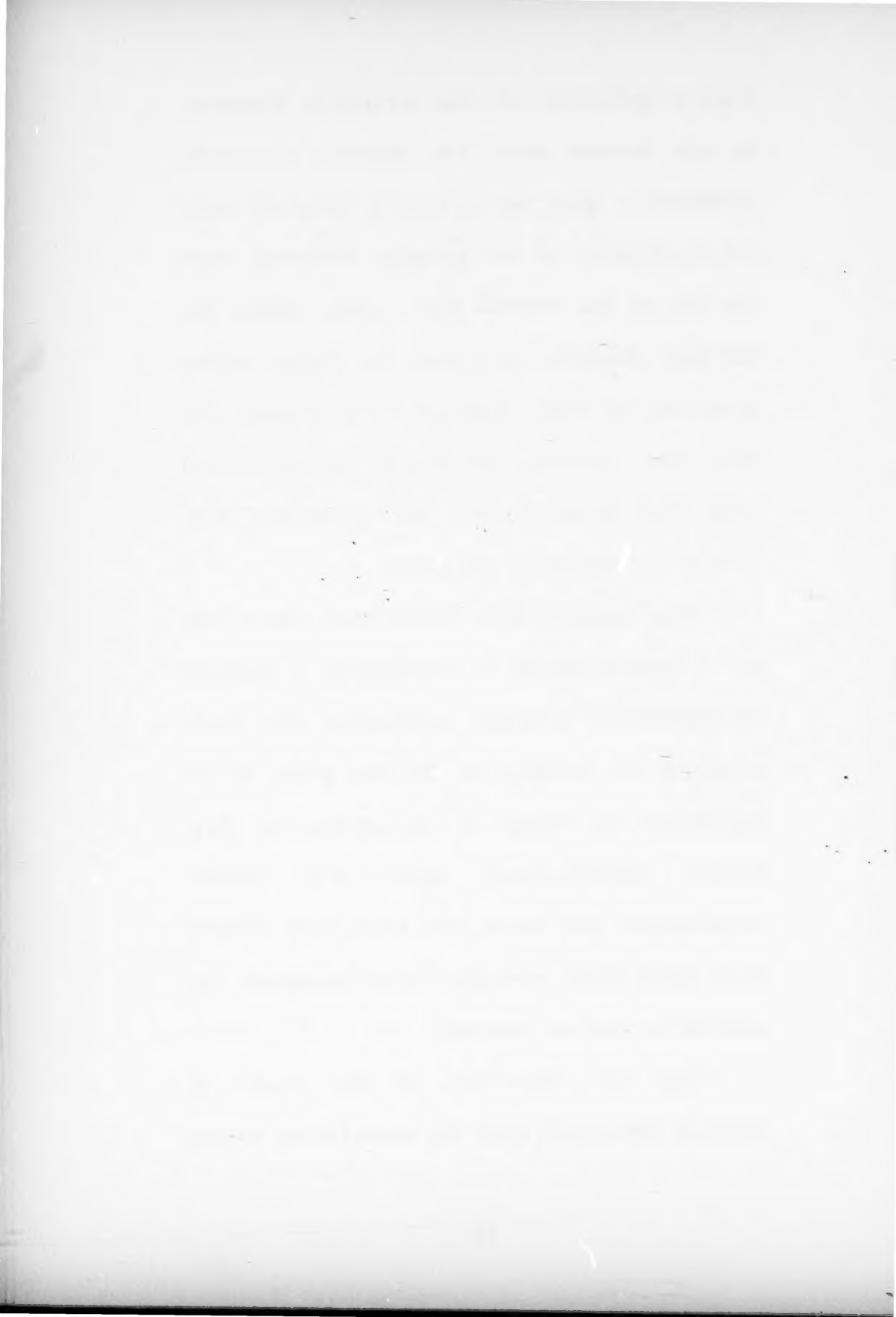
The majority distinguished this Court's holding in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). Unlike the property interest at stake in Logan, the majority wrote, the requirement that a civil service applicant demonstrate eligibility prior to the expiration of the eligible list is not a procedural limitation, but is part of New



York's definition of the property interest. In the instant case, the majority asserted, petitioner's asserted property interest was, substantively, of no greater duration than the life of the eligible list. And, unlike the 120-day deadline provision in Logan which advanced no State interest, New York's rule that civil service applicants be appointed from the most recent list promotes New York's constitutional directive.

The majority also found that there was no constitutional prohibition against distinguishing between applicants who have attacked the validity of the list prior to its expiration as being in derogation of New York's constitutional merit and fitness requirement and those who have only alleged they have been wrongly ruled ineligible for medical or similar reasons.

The two dissenters in the Court of Appeals disagreed with the majority as to the



substance of the property interest involved in this case and the circumstances under which, as a matter of New York law, the duration of an eligible list should be extended. The dissenters found that the alleged error made here as to petitioner's individual qualifications was sufficient to implicate the constitutional validity of the entire eligible list and thus, in their view, the petitioner had been denied relief solely on the basis of his failure to commence a timely judicial proceeding. The dissenters held that the above ground constituted a violation of petitioner's due process rights under this Court's decision in Logan.

REASONS FOR DENYING THE WRIT

THE NEW YORK COURT OF APPEALS HOLDING THAT PETITIONER'S PROPERTY INTEREST IN BEING CONSIDERED FOR CIVIL SERVICE APPOINTMENT WAS NECESSARILY LIMITED BY THE LIFE OF THE ELIGIBLE LIST DETERMINED A QUESTION PROPERLY COMMITTED TO STATE LAW. THERE IS NO BASIS HERE FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

Article V, §6 of the New York State Constitution provides in pertinent part, "Appointments and promotions in the Civil Service of the state and all of civil divisions thereof *** shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." Pursuant to this provision, periodic examinations are given to candidates for appointment and promotion in the civil service and, after the results of an examination are calculated, an eligible list is established which places the successful candidates in order of their

grades. The list continues for not less than one nor more than four years. An eligible list that has been in existence for one year or more terminates upon the establishment of a new list "unless otherwise prescribed by the state civil service department or municipal commission having jurisdiction" (Civil Service Law §56). Appointments must be made from names appearing on the list but the appointing authority is free, in its discretion, to select any one of the top three candidates.

The New York Court of Appeals has consistently interpreted these provisions for many years to mean that an applicant for a civil service promotion in New York has no property interest under New York law to that appointment. See, Hurley v. Board of Education of the City of New York, 270 NY 275 (1936); Cassidy v. Municipal Civil Serv. Commn., 37 NY2d 526 (1975). The Court



found that such applicant has at most a right to consideration for and a hope of appointment, but not a claim of entitlement. And whatever property interest an applicant has to be considered for appointment is limited to the life of the eligible list upon which his name appears. With the property interest so circumscribed, it necessarily follows that petitioner was not denied due process of law when the Department of Personnel was unable to certify his name for promotion because the eligible list had expired.

Petitioner erroneously argues that the limitation placed upon an applicant's right to be considered for appointment is actually procedural in nature and that it results in an arbitrary deprivation of property without furthering any valid governmental purpose. Such deprivation, petitioner argues, violates his right to due process of law, as did the

deprivation of property which occurred in Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).

Under New York law, petitioner's right to utilize and obtain relief as a result of the administrative relief procedures is limited to the life of the eligible list. This limitation is one of substance and is part of New York's definition of the property interest. The Logan decision is not at all apposite.

In Logan, supra, state law provided the claimant with the right to review of his claim of employment discrimination. The review procedures required that a fact-finding conference be scheduled within 120 days. Through inadvertence, the state agency neglected to schedule the conference until beyond the 120 day period, resulting in the dismissal of Mr. Logan's claim for lack of jurisdiction. This Court ruled that Mr. Logan's right to consideration of his claim

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under the state scheme was a property right which the state had deprived him of in an arbitrary and random manner by its rigid application of the 120 day limitation.

The instant case differs considerably from Logan, in that the petitioner here has no property interest under state law in the review of his disqualification and the implementation of an administrative ruling in his favor.

New York law affords petitioner only an appellate opportunity circumscribed by the life of the eligible list on which his name appeared. The instant case is thus more like Martinez v. California, 444 U.S. 277 (1980), which held that the application of a state immunity statute to defeat a tort claim was not unconstitutional. The Court stated, id., at 282:

the immunity defense, like an element of the tort claim itself, is merely one aspect of the state's definition of that property interest

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AMERICAN CHEMICAL SOCIETY
RE: [Illegible Title]
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. . . when state law creates a cause of action, the state is free to define the defenses to the claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law.

The holding of the New York Court of Appeals is thus perfectly in accord with the teachings of this Court which has consistently refrained from finding within the due process clause of the Fourteenth Amendment a source of property rights.

As this Court stated in Board of Regents v. Roth, 408 U.S. 564, 577 (1972):

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law

See also, Cleveland Board of Education v. Loudermill, 470 U.S. 532. Accord, Koscherak v. Schmeller, 363 F. Supp. 932, 936 (S.D.N.Y. 1973) (three-judge court) aff'd 415 U.S. 943 (1974).

THE UNIVERSITY OF CHICAGO
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TO THE HONORABLE SENATE OF THE UNIVERSITY OF CHICAGO

FOR THE PURPOSE OF RECOMMENDING THE GRANTING OF A

DEGREE OF DOCTOR OF PHILOSOPHY TO

MR. JAMES H. HARRIS

OF THE CITY OF CHICAGO

IN THE DEPARTMENT OF CHEMISTRY

FOR THE THESIS ENTITLED

"THE CHEMISTRY OF THE CARBON DIOXIDE SYSTEM"

BY JAMES H. HARRIS

UNDER THE SUPERVISION OF

PROFESSOR J. H. HARRIS

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Moreover, unlike Logan, in which the state's interest in the 120 day limit was found to be insubstantial, the limitation on the relief herein is grounded in Article V, §6, of the New York State constitution and strong public policy considerations favoring appointment off current lists. Indeed, compelling the Department of Personnel to revive expired lists or create a special eligibility list for every successful administrative appeal would be contrary to the law and public policy of New York State which requires City agencies to hire only those candidates found to be most qualified as a result of recent examinations. See Hurley v. Board of Education of the City of New York, 270 N.Y. 275 (1936).

Nor is it arbitrary or irrational for the State to allow the eligible list to be extended only for those applicants who bring a timely judicial challenge and successfully establish



the constitutional invalidity of the list itself and not merely error in their own designation as unqualified. Every extension of an eligible list, while desirable from the point of view of an individual applicant, exacts a price. It causes delay in filling vacant positions, which may have to be "saved" in case administrative and judicial review procedures later establish an applicant's qualifications. If, alternatively, the applicant is placed on a special eligible list, he will be considered for appointment before those who took a later, different competitive examination. Those applicants may be more qualified and deserving, at that point in time, of the appointment. The harshness to the applicant who, without fault, finds himself too late for certification is ameliorated by his ability to sit for the new competitive examination, with the question of his qualifications now settled.



The State may rationally distinguish the different situation where a timely judicial challenge to the list is made which demonstrates that the list itself is constitutionally invalid. In such a case, the entire rank order of the list is put into question and unqualified applicants may be appointed to permanent, tenured positions. Just as the State's merit and fitness requirements are furthered by not extending the eligible list in the first situation, an exception to the rule and extension of the list furthers the State's interest in the second. The rules defined by the Court of Appeals consistently advance legitimate State interests and provide no basis for petitioner to complain of constitutionally proscribed unequal treatment.



CONCLUSION

**THE PETITION FOR A WRIT OF
CERTIORARI SHOULD BE DENIED.**

Respectfully submitted,

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